No. 77-1355

In the Supreme Court of the United States

OCTOBER TERM, 1977

RUSSELL MCNIFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. No. 1) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1978. A petition for rehearing was denied on February 24, 1978 (Pet. App. No. 2), and the petition for a writ of certiorari was filed on March 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a statement made by the prosecutor in closing argument constituted an improper comment on petitioner's failure to testify.

2. Whether the district court properly exercised its discretion in limiting petitioner's counsel to 40 minutes for summation.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341, one count of using fictitious business names for the purpose of committing mail fraud, in violation of 18 U.S.C. 1342, and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371.[1] He was sentenced to concurrent terms of 15 months' imprisonment on the conspiracy and fictitious name counts, and to concurrent terms of five years' probation on the mail fraud counts. The terms of probation were to run consecutively to the terms of imprisonment. The court of appeals affirmed (Pet. App. A-1-1 to A-1-6).

1. The charges against petitioner stemmed from his involvement in a scheme to defraud various commercial and non-profit organizations by billing those organizations for office supplies that had never been ordered and that were never delivered. Among the witnesses who testified for the government were three co-defendants, Irving J. Field, Leonard J. Berk and Paul Sulak, each of whom had previously pleaded guilty and was awaiting sentence at the time of trial (Pet. 5). Neither petitioner nor co-defendant Harvey Weisenthal testified for the defense.

The evidence showed that in August 1974 co-defendant Weisenthal proposed to petitioner and co-defendants Field and Berk that they engage in the fraudulent billing

[1]Co-defendant Harvey Weisenthal was convicted of ten counts of mail fraud, one count of using fictitious business names and one count of conspiracy (Tr. 907-908).

of business accounts for office supplies that had not been ordered or delivered (Tr. 221-222, 226, 465-467). Co-defendant Field, who was in the office supply business, provided Weisenthal with the names of firms that had paid for supplies shipped to them on previous occasions (Tr. 222, 233, 467-468). Weisenthal then tested the scheme by placing telephone calls to two of Field's prior accounts. He stated that his business had had a computer breakdown, that as a result he had not yet mailed out invoices billing the accounts for office supplies that had previously been sent, but that a duplicate invoice would be forwarded shortly (Tr. 232).

After completing the calls, Weisenthal expressed confidence that the scheme would be successful (Tr. 232). As manager of the operation, petitioner was to handle all the bank accounts and incoming funds. In return, he was to receive ten percent of the gross receipts. Co-defendants Weisenthal and Field were to split the balance after deducting payments made to "salesmen" who were to contact the victimized accounts (Tr. 235, 238). The participants agreed that the operation would use the trade name All American Office Supply (Tr. 236).

On August 28, 1974, petitioner opened a bank account under the name All American Office Supply Company (Gov't Exh. 8). The following day, he filed a registration statement under that business name with the County Clerk of Los Angeles County (Gov't Exh. 1). Petitioner also opened an account under the same name at a mail receiving service, where he subsequently picked up mail addressed to the fictitious company (Tr. 387-391).[2] In

[2]Later, petitioner opened bank accounts and filed registration statements under the names Consolidated Office Supply and International Office Supplies (Gov't Exhs. 2, 3, 10, 12). He also

addition, both petitioner and Weisenthal purchased copies of office supply invoices from Douglas Giddings in 1975 (Tr. 578-585).[3] The invoices provided the names of new "customers" who were then billed for office supplies never ordered or shipped.

In August 1974, Joe Reid, an attorney in San Antonio, Texas, received in the mail two documents purporting to be duplicate invoices from All American Office Supply Company for office materials never ordered or received (Tr. 288-290; Gov't Exhs. 24(a), (b), and (c)). Likewise, David Saturley, a data processor for Thomas Industries of Hopkinsville, Kentucky, received in the mail two purported duplicate invoices from All American Office Supply for items never ordered or received (Tr. 319-321, Gov't Exhs. 25(a), (b), (c), and (d)). The invoices received by Reid and Saturley formed the basis of the two mail fraud counts on which petitioner was convicted.

2. In closing arguments, defense counsel strongly attacked the credibility of the three co-defendants who had testified for the government (Tr. 790, 793, 795, 798, 803, 805, 808). These witnesses were characterized by the defense as "admitted liars" (Tr. 798) who hoped to receive lenient sentences in return for their testimony and who thus had "every motive to attempt to minimize their participation and to thrust the blame off on somebody else" (Tr. 790-791).

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opened accounts under these names at different mail receiving services (Tr. 392-398, 312-316). Co-defendant Sulak, who was employed as a salesman for Consolidated Office Supply, was paid for his services by petitioner (Tr. 626-630).

[3]Giddings admitted that in October 1975 he burglarized the premises of a legitimate office supply company and stole invoices that he then sold to petitioner (Tr. 585-587).

In rebuttal, the prosecutor remarked that petitioner and co-defendant Weisenthal, not the government, had selected the co-defendant witnesses by enlisting their services in the fraudulent scheme. The prosecutor added (Tr. 822):

> But I would submit to you, ladies and gentlemen, that their testimony, regardless of what you think of them personally, is very believable. I would also say once again that their testimony was corroborated by every other bit of evidence in this case, every mail drop person, every document, every bank account, every victim.
>
> There wasn't one thing they said which was inconsistent with any other bit of evidence in this case.
>
> No question Mr. Giddings is a crook. Mr. Berk, Mr. Field, Mr. Sulak, they are all crooks. They told you that. I am telling you that. The only difference between those people and these two gentlemen is that they are willing to admit they are crooks.[4]

Petitioner and co-defendant Weisenthal objected to this last sentence and moved for a mistrial on the ground that it constituted an improper comment on the defendants' failure to testify, in alleged violation of *Griffin* v. *California,* 380 U.S. 609 (Tr. 832). After denying the motion

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[4]In his initial summation, the prosecutor made similar arguments in anticipation of defense counsel's challenges to the credibility of the co-defendant witnesses. The prosecutor observed that most of the government's evidence consisted of documents signed by petitioner or testimony from disinterested witnesses, including the mail receiving service employees and the addressees of the bogus invoices (Tr. 768-770). Furthermore, the prosecutor stressed that the co-defendants who testified had "freely admitted their own guilt" and had explained their own roles as well as those of petitioner and co-defendant Weisenthal (Tr. 773).

(Tr. 837-839), the district court carefully emphasized to the jury that the defendants were presumed innocent and were under no obligation to testify or produced evidence. The Court further instructed the jury that no unfavorable inference could be drawn from defendants' failure to testify or produce evidence (Tr. 841, 843, 844-845, 850, 851, 879).[5]

ARGUMENT

1. Petitioner contends (Pet. 10-14) that the prosecutor's statement in summation constituted an improper, albeit indirect, comment on petitioner's failure to testify that requires reversal of his conviction under *Griffin* v. *California, supra*. In *Griffin*, however, the jury was expressly encouraged by the prosecutor to draw adverse inferences from the defendant's failure personally to respond to the testimony against him. Moreover, the prejudicial impact of the prosecutor's comment in *Griffin* was reinforced by the trial judge's instructions that the jury could consider the defendant's failure to explain the evidence against him as indicative of the truth of that evidence. The circumstances of the present case do not remotely resemble those of *Griffin*.[6]

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[5]In addition, in the course of their summations, both defense counsel told the jury that no inference could be drawn from the defendants' failure to take the stand (Tr. 796-797, 817).

[6]Earlier this Term, this Court held that no constitutional privilege is infringed when a trial judge instructs the jury, over defendant's objection, that no adverse inference may be drawn from defendant's failure to testify. *Lakeside* v. *Oregon*, No. 76-6942, decided March 22, 1978. In the course of its opinion, the Court referred to its earlier holding in *Griffin* (slip op. 4, 5-6):

> In setting aside the judgment of conviction, the Court [there] held that the Constitution "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." * * *

* * * * *

> It is clear from even a cursory review of the facts and the square holding of the *Griffin* case that the Court was there concerned only with *adverse* comment, whether by the prosecutor or the trial judge * * *.

The prosecutor did not request the jury to draw any inference from petitioner's failure to testify. Viewed in context (see *United States* v. *Park*, 421 U.S. 658, 674-675; *Hamling* v. *United States*, 418 U.S. 87, 102), the prosecutor's statement was made in direct response to the defense attack upon the credibility of the three co-defendant witnesses. While perhaps inartfully phrased, the statement was intended to convey—and did convey—the message that, although the accomplice witnesses admittedly were "crooks," their testimony concerning the involvement of petitioner and Weisenthal in the scheme was worthy of belief because the witnesses had demonstrated considerable candor in testifying about their own complicity in the criminal venture and because their testimony was consistent with the other evidence in the case. In short, the prosecutor sought not to penalize petitioner for his silence but merely to bolster the credibility of several unsavory government witnesses whom the defense had branded as liars. See *United States* v. *Armedo-Sarmiento*, 545 F. 2d 785, 793-794 (C.A. 2), certiorari denied, 430 U.S. 917. See also *United States* v. *Ricco*, 549 F. 2d 264, 274 (C.A. 2), certiorari denied *sub nom. Indiviglia* v. *United States*, 431 U.S. 905; *United States* v. *Adamo*, 534 F. 2d 31, 40 (C.A. 3), certiorari denied *sub nom. Kearney* v. *United States*, 429 U.S. 841; *United States* v. *Kubitszky*, 469 F. 2d 1253, 1255 (C.A. 1), certiorari denied, 411 U.S. 908.

The courts of appeals, including the Ninth Circuit, have generally agreed that the test to be applied in assessing a claim like that advanced here is whether "the prosecutor's manifest intention was to comment upon the accused's failure to testify [or whether the challenged statement] was * * * of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Samuels* v. *United States*, 398 F. 2d 964, 968 (C.A. 5), certiorari denied, 393 U.S. 1021, quoted with approval in *United States* v. *Ward*, 552 F. 2d 1080, 1083 (C.A. 5), certiorari denied, October 3, 1977 No. 76-6920. See also *United States* v. *Rothman*, 567 F. 2d 744, 751 (C.A. 7); *United States* v. *Johnson*, 563 F. 2d 936, 942 (C.A. 8), certiorari denied, January 9, 1978 No. 77-5765; *United States* v. *Armedo-Sarmiento, supra; United States* v. *Dansker*, 537 F. 2d 40, 63 (C.A. 3), certiorari denied, 429 U.S. 1038; *United States* v. *Williams*, 521 F. 2d 950, 953 (C.A.D.C.); *United States* v. *Taitano*, 442 F. 2d 467, 468 (C.A. 9), certiorari denied, 404 U.S. 852; *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10). Application of this standard to the circumstances of the present case reveals no impropriety in the prosecutor's remark. Moreover, any possible error was rendered harmless by the district court's prompt and thorough curative admonitions that the defendants bore no burden of proof and that no inferences could be drawn from their failure to testify. See, *e.g., United States* v. *Johnson, supra*, 563 F. 2d at 942; *United States* v. *Brown*, 546 F. 2d 166, 173-174 (C.A. 5); *United States* v. *Taitano, supra*, 442 F. 2d at 469.[7]

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[7]One of the questions presented in *Lockett* v. *Ohio*, No. 76-6997, argued January 17, 1978, is whether the prosecutor's statement that the evidence against the defendant was uncontradicted and unrefuted constituted an impermissible comment on the defendant's failure to testify. The statement at issue here, viewed in context, was not an adverse comment on petitioner's failure to testify and is substantially less susceptible to that interpretation than the challenged remarks in *Lockett*. Petitioner complains that the prosecutor called to the jury's attention the defendants' unwillingness "to admit they are crooks." But, even if petitioner and his co-defendant *had* testified, they surely would have made no such admission. Under these circumstances, the jury could not have interpreted the prosecutor's statement as an invitation to draw adverse inferences from petitioner's failure to testify. Accordingly, disposition of the instant petition need not await the decision in *Lockett*.

2. Petitioner also contends (Pet. 17-20) that the district court erred in limiting his attorney to 40 minutes for closing argument instead of granting the full hour that defense counsel requested.[8] As the court of appeals properly held (Pet. App. A-1-5), however, the district court acted well within its discretion in limiting the length of the summations in this case.

After both sides had rested, the district court inquired of all counsel concerning the expected duration of their closing arguments. Petitioner's attorney initially stated that he would need 10 to 15 minutes more than the prosecutor, or perhaps half an hour in all (Tr. 744-745). After the prosecutor advised the court that his initial summation would require half an hour (and counsel for co-defendant Weisenthal indicated that his argument would take 20 to 30 minutes at most) (Tr. 745),

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[8]Petitioner also asserts (Pet. 4, 18) that the district court erred in telling the jury that it was the court's custom to permit the court reporter to read testimony to the jury during its deliberations only in exceptional cases. The record does not show whether the court's statement was directed toward petitioner's counsel or to the jury; in any event, the court later stated to counsel that, while there was no absolute right to have testimony read, if the jury were to request repetition of certain testimony, the court would carefully consider such a request at that time (Tr. 839-840). The jury, however, never made any such request.

petitioner's attorney asked for a full hour "just to be on the safe side" (Tr. 746). Counsel then stated that he needed an hour "to adequately cover the case"; the court granted him 40 minutes (Tr. 747).

In *Herring* v. *New York*, 422 U.S. 853, 862, this Court expressly recognized that the trial judge enjoys "great latitude" in controlling the duration of closing arguments. The courts of appeals have consistently accorded considerable deference to the sound discretion exercised by trial judges in imposing reasonable time limits for summations. See, *e.g.*, *United States* v. *Dye*, 508 F. 2d 1226, 1231 (C.A. 6), certiorari denied, 420 U.S. 974 (total of one hour and 40 minutes allotted to 11 defendants); *United States* v. *Hill*, 500 F. 2d 733, 739 (C.A. 5), certiorari denied, 420 U.S. 952 (20 minutes); *United States* v. *Salazar*, 485 F. 2d 1272, 1279 (C.A. 2), certiorari denied, 415 U.S. 985 (45 minutes); *United States* v. *Roviaro*, 379 F. 2d 911, 914-915 (C.A. 7) (30 minutes); *United States* v. *Mills*, 366 F. 2d 512, 515 (C.A. 6) (35 minutes); *Barnard* v. *United States*, 342 F. 2d 309, 321 (C.A. 9), certiorari denied, 382 U.S. 948 (30 minutes); *Butler* v. *United States*, 317 F. 2d 249, 256-257 (C.A. 8), certiorari denied *sub nom. Benedec* v. *United States*, 375 U.S. 836 (total of three full court days allotted to 36 individual defendants and one corporate defendant).

Here, the 40 minutes that the district court allotted to petitioner's counsel were more than sufficient for counsel to address the issues and the evidence in the case. Counsel for petitioner received more than the half hour he originally sought, and his argument was nearly twice as long as that for co-defendant Weisenthal. Moreover, since petitioner conceded that his signatures appeared on certain business registration statements and bank accounts that were used to further the fraudulent scheme (Tr. 801), the only defense available to him—and the only

one he pursued—was that he had been duped into signing these documents and therefore lacked the requisite criminal intent. More particularly, he argued that he did not know that the documents would be used in connection with an illegal venture, and he further claimed that the government's accomplice witnesses tried to establish his involvement "to save their own necks" (Tr. 803). This defense was relatively simple to convey to the jury and did not require extensive elaboration. Finally, petitioner's counsel was permitted to complete his argument without being interrupted by the court (Tr. 820).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]Petitioner's additional contention (Pet. 15-16) that the court of appeals' opinion does not satisfactorily articulate the grounds for affirmance is frivolous. The courts of appeals may exercise broad discretion in deciding whether or how to write opinions (see *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n. 4), and such internal matters of judicial administration should not be open to review merely because a litigant is dissatisfied with the outcome of his appeal.

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